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No. 90-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HECTOR RIVERA CRUZ, Secretary of Justice
of the Commonwealth of Puerto Rico,
Petitioner,

v.

PLAYBOY ENTERPRISES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Petition for Certiorari in this case presents a narrow question involving the straightforward application of well-settled principles of federal law. Accordingly, no reason exists for review by this Court.

STATEMENT OF THE CASE

Respondents—a national cable television programmer ("Playboy") and the association representing all cable television systems in Puerto Rico ("Cable Association")

—brought this case pursuant to 42 U.S.C. § 1983 ("Section 1983") to halt a concerted censorship campaign by petitioner and other officials of the Commonwealth of Puerto Rico, a campaign designed to intimidate cable systems throughout the island into ceasing carriage of The Playboy Channel. During the Spring of 1987, the office of the Secretary of Justice made a series of blatantly illegal and unconstitutional threats to prosecute cable operators who carried The Playboy Channel. This campaign of intimidation so clearly violated the First Amendment, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), that, shortly after respondents filed suit, the Commonwealth consented to entry of a permanent injunction against such conduct and against any future prosecution based upon programming previously carried on The Playboy Channel. The validity of that relief is not at issue in this petition.

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[1] The District Court had previously entered a comprehensive Temporary Restraining Order. In the consented-to permanent injunction, petitioners were enjoined from:

> (a) imposing any administrative sanctions against cable operator members of the Cable Association based upon any transmissions of The Playboy Channel;
>
> (b) threatening to prosecute members of the Cable Association for any programming carried on The Playboy Channel, or taking any adverse actions against the members in reprisal for the exercise of their First Amendment rights;
>
> (c) prosecuting or sanctioning in any way members of the Cable Association or any other person or entity for past programming on The Playboy Channel;
>
> (d) interfering with any programming carried on The Playboy Channel by intimidating or putting coercive pressure on members of the Cable Association.

Playboy Enterprises, Inc. v. Public Service Commission of Puerto Rico, 906 F.2d 25, 28 (1st Cir. 1990); App. 4a-5a.

Petitioner is flatly wrong in asserting that respondents' First Amendment claims somehow lacked force or were voluntarily abandoned. To the contrary, respondents' First Amendment rights to injunctive relief are no longer at issue because they have been completely vindicated by the entry of the permanent injunction. Petitioner's willingness to consent to the entry of this sweeping

Respondents also sought permanent relief from prosecution, based upon *future* programming, for members of the Cable Association carrying The Playboy Channel pursuant to the mandatory access provisions of the Cable Communications Policy Act of 1984 ("the Cable Act"). Section 532 of the Cable Act imposes mandatory access obligations upon cable operators whose systems have at least 36 "activated channels."[2] 47 U.S.C. § 532(b) & (b)(5)(A). Such operators must make available a statutorily-prescribed percentage of their channel capacity for "commercial use" by "unaffiliated" programmers. *Id.* § 532(b)(1).[3] When an unaffiliated programmer requests access under Section 532, a cable operator is statutorily required to grant that request unless the operator has already fulfilled its access requirements. *Id.* § 532(c)(1). Once an unaffiliated programmer obtains access, the cable operator *is prohibited by federal law from exercising any editorial control* over the programming transmitted on the channel. *Id.* § 532(c)(2).

The provisions of Section 558 of the Cable Act are essential to the success and fairness of the commercial access scheme established in Section 532. Section 558 confers immunity on cable operators for programming carried on Section 532 commercial access channels:

> cable operators shall not incure any [civil or criminal] liability [for libel, slander, obscenity, incitement,

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relief, notwithstanding his articulated desire to preserve the Commonwealth's enforcement authority, testifies to the strength of respondents' First Amendment claims.

[2] In this way, section 532 directly advances one of the Cable Act's core purposes: to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4) (statement of purposes).

[3] The Cable Act defines "commercial use" as the "provision of video programming, whether or not for profit," 47 U.S.C. § 532(b)(5)(B), and defines "unaffiliated" as meaning the absence of common ownership or control. *Id.* § 522(1).

> invasions or privacy, false or misleading advertising, or other similar laws] for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under Section 532 of this title or under similar arrangements.

47 U.S.C. § 558. Basic fairness dictates the need for such a provision to insulate cable operators from liability for programming over which they have no editorial control. *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. (1984). Section 558 immunity is equally important to achieving the additional statutory goal of encouraging private consensual arrangements for commercial access, and obviating the need for litigation between programmers seeking access and operators wishing to protect themselves from an uncontrollable risk of criminal or civil liability.[4]

In September 1987, respondents moved for summary judgment permanently enjoining prosecution of Teleponce, a member of respondent Cable Association, for programming carried on The Playboy Channel pursuant to Section 532. Undisputed evidence established that respondent Playboy had maintained access to the Teleponce cable system only by invoking the mandatory commercial access provisions of Section 532.[5] Undisputed evi-

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[4] One reason a cable operator will not wish to disseminate a particular viewpoint is government hostility to that viewpoint, hostility that could easily translate into adverse regulatory action. Moreover, even *without* advance government hostility, operators would be properly hesitant to cede all editorial control over programming if they could be held criminally liable for its contents. Accordingly, without immunity, cable operators could be expected to resist doggedly all requests for Section 532 access from unaffiliated programmers, necessitating recourse to the courts to enforce programmers' access rights. The costs and delays imposed by such suits would deter use of Section 532 and would therefore limit the programming diversity sought by Congress.

[5] Teleponce had publicly expressed its intention to discontinue The Playboy Channel in the face of government pressure. *See* Affidavit of Hector Gonzalez, at ¶ 12, *reprinted in* Supplemental Ap-

dence also demonstrated that Teleponce was obligated under the terms of Section 532 to provide the requested access, and had done so. Section 558 of the Cable Act therefore barred prosecution of Teleponce for transmitting The Playboy Channel.[6] The Commonwealth of course remained free to prosecute *Playboy* for any future programming deemed obscene, and Playboy had even taken the step of voluntarily submitting to personnel jurisdiction in the Puerto Rico courts to facilitate prosecution. No such prosecution has been filed.

The district court granted respondents' motion for summary judgment and permanently enjoined prosecutions of Teleponce for programming transmitted on The Playboy Channel. The court found, on the basis of undisputed material facts, that Teleponce was obligated to make channel capacity available to unaffiliated commercial programmers pursuant to Section 532, that Playboy had specifically requested access to such capacity pursuant to Section 532, and that Teleponce granted such access. 698 F. Supp. at 416; App. 64a-65a. Accordingly, the court held, Section 558 expressly prohibited prosecution of Teleponce for carriage of the Playboy Channel. *Id.* The Court of Appeals affirmed that ruling in all respects, and petitioner does not challenge it before this Court.

The only argument raised in the Petition for Certiorari is the narrow claim that Section 1983 is unavailable to cable operators such as Teleponce wishing to

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pendix to the Court of Appeals proceedings ("SA") at 70. An application for mandatory access pursuant to Section 532 was the only means available to respondent Playboy Programming Distribution Company ("PPDC") to keep the Playboy Channel on the Teleponce system. *Id.* *See also* Affidavit of Michael Fleming, at ¶¶ 3, 4; SA 125.

[6] As the district court noted, petitioners stipulated that respondent Teleponce had a reasonable fear of prosecution for carrying the Playboy Channel, 698 F. Supp. 401, 405 (D.P.R. 1988); App. 41a, thus eliminating any question as to the ripeness of the action.

shield themselves from an unlawful threatened prosecution based on programming carried on a commercial access channel.

REASONS FOR DENYING THE WRIT

No reason exists for granting certiorari in this case. Petitioner has pointed to no decision in conflict with the opinion under review, and none exists. Nor does this case present any important or unresolved question of federal law. The Petition for Certiorari raises no issue of any kind respecting the proper interpretation of the Cable Act. And petitioner concedes that the Court of Appeals applied the correct legal standard to determine whether respondents could bring this action pursuant to Section 1983.[7] In short, the case raises no issues of general importance.

Petitioner contends review is warranted for two reasons: (i) the Court of Appeals reached an incorrect result; and (ii) a Section 1983 cause of action to vindicate rights created by Section 558 of the Cable Act infringes Puerto Rico's authority to enforce its laws. As will be demonstrated, however, the decision of the Court of Appeals was plainly correct on the merits, and recognizing a Section 1983 cause of action to enforce rights created by Section 558 imposes no limitation on the enforcement authority of Puerto Rico beyond that imposed by the Cable Act itself.

1. Section 1983 provides a cause of action to vindicate rights created by federal statute as well as those created by the Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) ("the phrase 'and laws', as used in § 1983, means what it says"). Section 1983 is generally available to vindicate statutory rights unless one of two

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[7] The Petition for Certiorari correctly contends that the standards set forth in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989), control this case. *See* Petition at 7-8. The Court of Appeals applied exactly the test advocated by petitioner. 906 F.2d at 32-33; 13a-16a.

conditions is met. First, there is no enforceable "right, privilege, or immunity" under Section 1983 if the statute at issue "does no more than express a congressional preference for certain kinds of treatment," or if the federal interest is so "vague and amorphous" that it is "beyond the competence of the judiciary to enforce." *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989); *see also Pennhurst State School v. Halderman*, 451 U.S. 1, 19 (1981); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 431-432 (1987). Second, "even when the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under § 1983' by providing a 'comprehensive enforcement mechanism'" for protecting that right. *Golden State Transit Corp.*, 110 S. Ct. at 448 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9, 1003 (1984)).

The Court of Appeals applied precisely this two-part test to determine whether a Section 1983 cause of action was available in this case. 906 F.2d at 32-33; App. 13a-16a. Petitioner does not contend that this test should be reexamined, or that the Court of Appeals departed from the test in some fundamental way meriting correction by this Court. Petitioner does not even challenge the Court of Appeals' conclusion that Section 558 of the Cable Act creates an enforceable "right, privilege or immunity." *See* Petition at 9-13.[8] Petitioner argues only

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[8] The Court of Appeals' ruling on this point is not reasonably open to challenge. As the court held:

> Section 558 uses unequivocal, mandatory language: "cable operators shall not incur any liability for any program" carried on any public, educational, governmental or leased access channel. This immunity can be protected effectively by enjoining prosecution.

906 F.2d at 32; App. 13a-14a. The express prohibition set forth in Section 558 is a far cry from the type of nonbinding indication of congressional preference that has been found not to create rights enforceable through Section 1983. *See Pennhurst State School v. Halderman*, 451 U.S. 1, 19 (1981).

that the Court of Appeals misapplied the second part of the test. *Id.* at 9-18.

Even if review were generally warranted to correct a possible partial misapplication of settled federal law—and it is not[9]—review is wholly unnecessary in this case because the Court of Appeals' ruling is plainly correct. To preclude a Section 1983 remedy under the second part of the *Golden State Transit Corp.* analysis, petitioner must "demonstrate[] by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 423. Petitioner cannot meet that burden.

Nowhere in the text or legislative history of the Cable Act does Congress express the specific intent to foreclose a Section 1983 remedy for the rights and immunities created by Section 558. To support an inference of such intent, petitioner claims that the Cable Act creates an "elaborate and multi-tiered enforcement and remedial scheme." Petition at 9. But, as the Court of Appeals correctly observed when faced with the same argument below, "[t]he sum of these remedial provisions hardly creates a 'comprehensive remedial scheme' leaving 'no room for additional private remedies under § 1983.'" 906 F.2d at 33; App. 15a (quoting *Wright*, 479 U.S. at 423). In particular, none of the remedial and enforcement provisions to which petitioner points even purports to provide a means for enforcing Section 558 against anyone, much less against state actors bent on violating its unambiguous terms. At a minimum, as the Court of Appeals held, "before one can conclude that Congress meant to displace a § 1983 suit with a particular remedial scheme, that scheme must at least serve to protect the federal right created in the statute and at issue in the case." *Id. See Smith v. Robinson*, 468 U.S. at 1011-12 (Section 1983 remedy precluded only where it would

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[9] *See infra*, point 3.

"render superfluous most of the detailed procedural protections outlined in the statute").

Denial of a Section 1983 cause of action to safeguard the rights and immunities created in Section 558 would, in contrast, directly thwart the express purposes of Section 558, Section 532, and the Cable Act as a whole. Section 558 is obviously intended to ensure that cable operators are not unfairly subjected to the criminal process for cable programming over which they have no editorial control. The mere fact of an obscenity indictment, and the attendant publicity, would severely damage the reputation and good will of a cable operator, whether or not the operator is eventually exonerated. A cable operator who must await actual criminal prosecution to assert a clear entitlement to immunity under Section 558 would in all likelihood suffer public opprobrium and economic harm as a result of the delay.

Moreover, as the facts of this case amply illustrate, denial of a Section 1983 remedy would undermine the Cable Act's core purpose of promoting a diversity of cable programming sources. A cable operator unable to vindicate Section 558 immunity in an anticipatory Section 1983 action would be especially vulnerable to government pressures like those exerted against Teleponce in the present case. Rather than risk the opprobrium of an obscenity indictment, a cable operator will in all likelihood refuse to carry programming on a Section 532 channel.[10]

2. Petitioner also appears to contend that permitting a Section 1983 cause of action to vindicate rights created by Section 558 of the Cable Act would impermissi-

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[10] Under threat of government prosecution, several cable operators in Puerto Rico simply discontinued carriage of The Playboy Channel to avoid the adverse personal and economic impact of indictment. Teleponce, notwithstanding its § 532 obligations, had made clear that absent injunctive relief under § 1983, it too, would drop The Playboy Channel. Gonzalez Aff., ¶ 12, SA 71.

bly impinge on the Commonwealth's legitimate enforcement authority. This claim cannot withstand even cursory scrutiny.

Petitioner's complaint is ultimately not with Section 1983, but with the Cable Act itself. The Petition for Certiorari does not dispute that The Playboy Channel was carried on the Teleponce system in Puerto Rico as a commercial access channel pursuant to the rights and obligations established in Section 532 of the Cable Act. Federal law requires Teleponce to carry the channel, 47 U.S.C. § 532(b)(1), and forbids Teleponce from exercising any editorial control over the channel's contents. *Id.* § 532(c)(2). Section 558 thus unequivocally bars *any* prosecution of Teleponce for the contents of The Playboy Channel on the Teleponce system. *Id.* § 558. Accordingly, recognizing a Section 1983 cause of action places no greater restriction on the Commonwealth's legitimate enforcement authority than does Section 558 of the Cable Act standing alone. The permanent injunction at issue thus does not bar *legitimate* prosecution; it bars only prosecution all parties now recognize as *illegitimate.*

Furthermore, there is no force to petitioner's assertion that a Section 1983 cause of action impairs the Commonwealth's ability to investigate and challenge the *bona fides* of Section 532 arrangements. Nothing in the Court of Appeals' ruling prevents petitioner from challenging the authenticity of a Section 532 arrangement in the context of a Section 1983 action by a cable operator seeking vindication of Section 558 immunity. Indeed, that is precisely what happened here.[11] Petitioner's argument boils down to a preference for adjudicating these questions in Commonwealth rather than federal courts. But that "is hardly a reason to bar an action under

[11] The district court concluded, on the basis of undisputed facts, that a legitimate Section 532 relationship existed between Playboy and Teleponce, and the Court of Appeals affirmed that ruling. Petitioner does not dispute the ruling in the Petition for Certiorari.

§ 1983, which was adopted to provide a federal remedy for the enforcement of federal rights." *Wright*, 479 U.S. at 429.[12]

Finally, the Commonwealth's legitimate enforcement authority is entirely unimpaired. As noted, the Commonwealth remains free to prosecute the cable *programmer* for programming transmitted over channels designated pursuant to Section 532. In this case, for example, the Commonwealth could have prosecuted Playboy if the Secretary of Justice genuinely believed the Playboy Channel violated Puerto Rico's obscenity laws.[13] Nor does the ruling under review create any obstacle to prosecution of cable operators for programming carried on channels other than those designated to fulfill obligations imposed by Section 532 of the Cable Act. Far from thwarting the Commonwealth's legitimate enforcement interests, the Cable Act carefully accommodated those interests while seeking to increase programming diversity through commercial access requirements.

What petitioner really seeks to preserve is thus *not* the Commonwealth's legitimate authority to enforce obscenity laws and verify the *bona fides* of Section 532 arrangements; he seeks to preserve the ability to

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[12] The principles of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny fully protect the legitimate interests of the Commonwealth in this respect. If the Commonwealth has probable cause to believe that obscene programming is being transmitted and that a cable operator is seeking to avoid transmission by means of a "sham" Section 532 arrangement, and brings a criminal action in the local courts on that basis, *Younger* would preclude resort to Section 1983 to enjoin the ongoing prosecution. It has long been settled, however, that Section 1983 may be invoked to enjoin state proceedings that have not yet commenced. *Steffel v. Thompson*, 415 U.S. 452 (1974).

[13] Indeed, as noted, Playboy *consented* to Puerto Rico's jurisdiction over it for such purposes. The suggestion in the Petition that Puerto Rico will lack the ability to enforce its laws because programming typically arrives via satellite from distant locations, *see* Petition at 17, thus creates a seriously misleading impression.

threaten local obscenity prosecution barred by the Cable Act, in the hope that the obloquy and expense associated with such prosecution will force cable operators to forsake their Cable Act obligations and bend to the Commonwealth's censorial aims. The Commonwealth's near success in forcing Teleponce to drop The Playboy Channel demonstrates the need for a Section 1983 cause of action.

3. There are no other reasons for plenary review of the First Circuit's straightforward decision. In the six years since passage of the Cable Act, no other case with a remotely similar fact pattern has reached the courts—indeed, no other decision applying or construing the commercial access provisions of § 532 or the immunity provisions of § 558, separately or together, has been reported or has reached the courts, so far as respondents are aware. Until at least one other action raising similar issues reaches the courts, there is no reason whatsoever to suppose that petitioner has raised a significant question of federal law.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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